United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

76-2065

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ARTHUR RICHARD GATES, :

Petitioner-Appellant, :

-against- : Docket No. 76-2065

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility, :

Respondent-Appellee. :

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PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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MEMORANDUM OF LAW IN SUPPORT
OF PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING EN BANC

This is a memorandum of law in support of respondent-appellee's petition for rehearing with suggestion for rehearing en banc.

On January 12, 1977, a panel of this Court decided by a two to one vote the case of Arthur Richard Gates v. Henderson, Superintendent of Auburn Correctional Facility, Slip. Op. 1345, see "Appendix". It is respectfully submitted that the issues are of such importance as to warrant plenary review by the Court en banc.

On federal habeas review the majority ordered an evidentiary hearing into the merits of petitioner's Fourth Amendment claim that certain fingerprint evidence was taken from him without probable cause. Petitioner's trial counsel in the state court trial, which took place more than ten years ago, made no motion to suppress this evidence either before or during trial. No excuse for this failure has ever been made. Petitioner's trial counsel did utter a mid-trial objection to the evidence on "constitutional" grounds, but failed to specify the basis of the objection. The trial court inquired whether counsel was objecting to "the mere fact of the taking of the prints", to which counsel responded in the affirmative. The objection was overruled and the trial resumed. Petitioner was convicted of murder.*

Three New York courts, in written opinions, concluded that petitioner had not raised his Fourth Amendment claim in the trial court and had waived that claim. The claim that the

* The prejudice to petitioner is problematical, since it appears from the evidence against petitioner (People v. Gates, 24 N Y 2d 666) that the discovery of the print match was all but inevitable. See People v. Fitzpatrick, 32 N Y 2d 499, 506 (1973), and cases cited therein.

fingerprints were taken in violation of the Fourth Amendment was not even made until oral argument in the State Court of Appeals. The State Court of Appeals concluded that petitioner had waived his claim because "he failed even to intimate that such an issue was in the case". People v. Gates, 24 N Y 2d 666, 670 (1969). Petitioner's application for a writ of error coram nobis, in which he asserted his Fourth Amendment claim, was also denied on the same grounds. People v. Gates, 61 Misc 2d 259, 305 N.Y.S. 2d 585 (Rockland County Ct., 1969), affd. 36 App. Div. 2d 761, 319 N.Y.S. 2d 569 (1971).

The facts of this case are set forth in more detail in the majority opinion.

The majority concluded that (1) petitioner's Fourth Amendment claim was cognizable in federal habeas review because he had not had an "opportunity for full and fair litigation" of that claim within the meaning of Stone v. Powell, 44 USLW 5313 (July 6, 1976), and (2) petitioner's procedural defaults in state court did not bar federal habeas review of his claim. It is respectfully submitted that both conclusions are in error.

CONCLUSION

THE PETITION FOR REHEARING
OR REHEARING EN BANC SHOULD
BE GRANTED.

Dated: New York, New York
January 25, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
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State of New York
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A. Applicability of Stone v. Powell

After "some struggle to understand the implications of recent High Court cases", Slip. Op. 1346, the majority concluded that an "opportunity"for full and fair litigation of a Fourth Amendment claim under Stone v. Powell requires a fair evidentiary hearing within the meaning of Townsend v. Sain, 372 U.S. 293 (1963). The primary authority for this conclusion was a "Cf." citation to Townsend in a footnote to Stone v. Powell, said to be of "some" relevance to the question of whether an adequate opportunity has been provided. The majority felt that the Supreme Court in Stone v. Powell, had provided "limited assistance" in understanding the meaning of "opportunity".

It is respectfully submitted that the majority's judgment as to the meaning of "opportunity" is erroneous. The "Cf." reference to Townsend in Stone v. Powell, may possibly be of significance as a guide to what the Supreme Court in Stone meant by the term "full and fair leitigation", but respondents submit that Townsend is of little assistance in ascertaining the meaning of "opportunity".

Respondent contends that the meaning of "opportunity" is quite clear. An "opportunity" is provided when a procedure to challenge illegally seized evidence is provided. New York unquestionably had such a procedure. Former New York CCP 813(d). The problem in this case is that the procedure was not utilized.

Assuming arguendo that the majority was correct in concluding that the key to the meaning of "opportunity" is to be found in Townsend, it is respectfully submitted that the majority erred in concluding that no Stone v. Powell "opportunity" existed because of the "state courts' failure to develop evidence crucial to appellant's claim." Slip. Op. 1360. Since the claim was never raised, Point B, infra, a fortiori no evidence crucial to the claim could have been developed.

Respondent also contends that the majority opinion is erroneous in that it results in the circumvention of the entire rationale and purpose of Stone v. Powell.

If no rehearing is granted, it is respectfully suggested in view of the majority's plain difficulty in resolving the applicability of Stone v. Powell that the question be

reviewed by this Court en banc. At issue is not simply the merits of a particular case but the scope of federal habeas review in a whole class of cases.

B. State Procedural Default

The majority concluded that petitioner did not commit "the sort of procedural default" that would bar his claim on federal habeas review, and that Estelle v. Williams, 44 USLW 4609 (1976) and Francis v. Henderson, 44 USLW 4620 (1976) did not change the "deliberate by-pass" rule of Fay v. Noia, 372 U.S. 391, 438 (1963) for purposes of this case. It is respectfully submitted that these conclusions are erroneous.

At no time did petitioner make a motion to suppress in the trial court. A motion to suppress is the proper remedy for challenging illegally seized evidence in New York. Hence, respondent contends that the majority erred in concluding that "(i)t is specificity, not timeliness, that is at issue here" (Slip. Op. 1358, n. 8). Timeliness is very much the issue here and the failure to make a timely motion to suppress* bars

* A mere objection at trial, even if specific, is not only untimely; it is the wrong remedy or procedure to challenge allegedly illegally seized evidence. A motion to suppress encompassing an evidentiary hearing was the necessary procedure in this case.

federal review of the claim. This was always settled law in this Circuit. United States ex rel. Tarallo v. LaVallee, 433 F. 2d 4 (2d Cir. 1970), cert. den. 403 U.S. 919. The majority's attempt to distinguish Tarallo thus misses the mark (Slip. Op. 1358, n. 8).

Assuming arguendo that specificity and not timeliness is the issue, the respondent contends that the trial counsel's objection was on its face a Fifth, not a Fourth Amendment objection. Faced with a vague objection, the trial court asked if counsel by his objection meant that he objected to the "mere fact of the taking of the prints." Trial counsel responded, "Yes, Sir". Respondent respectfully submits that the majority erred in concluding (Slip. Op. 1356) that such an objection in any way "intimated" that the Fourth Amendment was an issue in the case. It is not surprising that the New York courts did not take note of this objection.

The majority concluded that petitioner was entitled to a hearing on the merits because he could not be said to have committed a "deliberate bypass". Deliberate bypass is not an absolute rule. This Court has previously and even routinely denied relief to habeas petitioners raising Fourth Amendment

claims where procedural defaults had occurred in state court. Tarallo, supra. In Tarallo, "deliberate bypass" was not even mentioned. See also United States ex rel. Satz v. Mancusi, 414 F. 2d 90 (2d Cir. 1969).

Respondent submits that the majority's decision renders valid state law procedural timeliness requirements a complete nullity.

Unquestionably the "deliberate bypass" rationale and rule relied on by the majority has been eroded by Estelle v. Williams and Francis v. Henderson, supra. Francis v. Henderson does not purport to limit its rationale to grand jury composition cases, nor is there any sound reason to do so. The Supreme Court in Francis v. Henderson (at 4622) indicated clearly that the standards to be followed was that federal habeas review could be barred unless good cause and actual prejudice has been shown. Here no "good cause" for failing to make a timely motion to suppress has been shown or claimed. Certainly, the majority was at least correct in noting that the "deliberate bypass" language of Fay v. Noia could "conceivably be under re-examination by the [Supreme] Court". Slip. Op. 1357, n. 7. This in fact appears to be the case. The Supreme Court in Wainwright v. Sykes, No. 75-1578, cert. granted 45 USLW 3280 (10/12/76) granted certiorari in a habeas corpus case in which one issue is whether the failure to question the admissibility of an out

of court statement, at or before trial, bars a state prisoner from presenting his voluntariness claim in a federal habeas proceeding where such failure constitutes a waiver under state practice.

In view of the exceedingly numerous federal writs of habeas corpus in which procedural defaults occur in state court; and in view of the confusion and differences in the cases on the effect to be given to these defaults on federal habeas review, it is respectfully submitted that this issue merits reconsideration by this Court or consideration by this Court en banc. The majority opinion shows that this is a case of high importance in federal habeas litigation of state court judgments and appears to be at variance with decisions of panels of this Court in analogous situations. In addition, the majority opinion will have an impact on the consequences of Stone v. Powell. Thus, it merits reconsideration or consideration en banc.

V

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 361—September Term, 1976.

(Argued October 19, 1976 Decided January 12, 1977.)

Docket No. 76-2065

ARTHUR RICHARD GATES,

Petitioner-Appellant,

v.

ROBERT J. HENDERSON, Superintendent, Auburn Correctional Facility,

Respondent-Appellee.

Before:

SMITH, OAKES and TIMBERS,

Circuit Judges.

Appeal from dismissal of petition for habeas corpus by the United States District Court for the Southern District of New York, Robert L. Carter, *Judge,* on the legal ground that petitioner had failed adequately to raise constitutional claim in state courts.

Reversed and remanded for evidentiary hearing.

JESSE BERMAN, New York, N.Y., *for Petitioner-Appellant.*

RALPH MCMURRY, Assistant Attorney General, State of New York (Louis J. Lefkowitz,

Attorney General, Samuel A. Hirschowitz, First Assistant Attorney General of counsel), *for Respondent-Appellee.*

OAKES, *Circuit Judge:*

Had this appeal been before us one year ago, it would have been relatively easy to resolve. Three Supreme Court decisions in the spring and summer of 1976, while perhaps intended to simplify the federal courts' labors as to habeas corpus petitions brought by state prisoners, have instead complicated analysis in the instant case. The United States District Court for the Southern District of New York, Robert L. Carter, *Judge*, dismissed appellant's petition under 28 U.S.C. § 2254 on the ground that appellant had failed adequately to raise, for New York state law purposes, his Fourth Amendment claim in the state courts. After some struggle to understand the implications of the recent High Court cases, we have concluded that we must reverse.

Facts

The facts are essentially undisputed. In September, 1966, appellant's estranged wife died of multiple stab wounds sustained in her apartment in Spring Valley, New York. Before losing consciousness, she responded to a neighbor's inquiry as to whether her husband had been the assailant by saying, "I don't know, but he wore glasses," as did appellant. Just 45 minutes later, appellant's car was stopped ten miles from the scene of the stabbing for an offense entirely unconnected with the stabbing, failure to dim his headlights. For reasons that are obscure, the officer who stopped appellant, after taking his driver's license and registration, arrested him in connection with the stabbing.

Appellant was subsequently charged with first-degree murder, convicted by a jury in Rockland County Court, and sentenced to a prison term of from 20 years to life. The evidence at his trial was entirely circumstantial, consisting primarily of threats he had made against his wife and a set of fingerprints and palmprints found on the apartment's bathroom windowsill, through which the assailant apparently entered the dwelling. Some of the prints matched appellant's prints, which were taken by the police a few hours after appellant's arrest. In reviewing the sufficiency of the evidence on which appellant was convicted, the New York Court of Appeals, expressing doubt whether the threats alone would have been sufficient, upheld the conviction because of "the almost conclusive force of the fingerprint evidence . . . [which] pointed ineluctably to the defendant's guilt . . . ." *People* v. *Gates*, 24 N.Y.2d 666, 669, 249 N.E.2d 450, 451-52, 301 N.Y.S.2d 597, 600 (1969).

Appellant's trial counsel objected to the introduction of appellant's prints, taken at the police station following his arrest. Counsel did so, however, on grounds that were regrettably ambiguous, and this ambiguity has led to the instant litigation. Out of the presence of the jury, defense counsel had the following colloquy with the trial judge:

> Defense Counsel: While there is no question, and we will stipulate, that [the prints] were taken of the the defendant in this case, we raise objection not to the fact that they are or are not his prints but to the introduction of those prints on the basis that this man's constitutional rights both under the State and Federal constitutions have been violated by the taking of these prints and as such we object to them.
>
> The Court: Your objection is then on constitutional grounds to the mere fact of the taking of the prints?

Counsel: Yes, sir.
The Court As such?
Counsel: Right, sir.
The Court: I will overrule that objection.
Counsel: Exception.
The Court: And you will have a similar objection, without having to renew it, for the record to any further introduction of prints taken of the defendant by any other law enforcement officer.
Counsel: Fine, sir.
The Court: And with the same ruling.

It is not clear whether counsel was objecting on Fifth Amendment grounds, that being compelled to be fingerprinted was "to be a witness against himself," *compare Boyd* v. *United States*, 116 U.S. 616, 633-34 (1886) (compelling production of private papers may violate Fifth Amendment), *and Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964) (Fifth Amendment's self-incrimination clause applies to states), *with Schmerber* v. *California*, 384 U.S. 757, 764 (1966) (compelling blood test, fingerprinting, photographing, etc., does not violate Fifth Amendment); or on Fourth Amendment grounds, that fingerprints obtained after an arrest made without probable cause were inadmissible, *see Davis* v. *Mississippi*, 394 U.S. 721, 723-24 (1969); or on both, *see Boyd* v. *United States*, *supra*, 116 U.S. at 633. The ambiguity is there even though the objection was made some six months after *Schmerber*, *supra*, which made it unavailing if on grounds of the Fifth, and over two years before *Davis*, which made it clearly availing on grounds of the Fourth.[1]

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1 Counsel had previously objected in open court to a question calling for the arresting officer's description of appellant's right hand as observed at the station in the fingerprinting process, also on vague "constitutional grounds," an objection that could likewise have gone either

Appellant's conviction was affirmed by both New York's Appellate Division, 29 App. Div. 2d 843, 288 N.Y.S.2d 862 (1968) (mem.), and Court of Appeals, *supra*. The latter court, with the benefit of *Davis* v. *Mississippi*, *supra*, to which it referred, recognized that fingerprint evidence that is the fruit of an arrest without probable cause must be excluded,[2] but held that appellant had failed to object

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to the Fourth or to the Fifth Amendment or to both. The objection was similarly overruled by the trial court.

2 The New York Court of Appeals stated:

> In the light of the Supreme Court's recent decision in *Davis* v. *Mississippi*, 394 U.S. 721 . . ., there can be no doubt that fingerprint evidence is "subject to the proscriptions of the Fourth and Fourteenth Amendments" and that such evidence is to be excluded if it be the product of an illegal arrest (394 U.S., at p. 724 . . .).

People v. *Gates*, 24 N.Y.2d 666, 670, 249 N.E.2d 450, 452, 301 N.Y.S.2d 597, 601 (1969). The court's statement is ambiguous as to whether it viewed *Davis* as establishing a new rule of law retroactively binding in appellant's case—the fingerprinting and trial of appellant occurred prior to *Davis*—or whether it viewed *Davis* as merely clarifying established New York or federal constitutional law. The latter interpretation seems the most likely one in light of the *Davis* opinion:

> [I]n *Mapp* v. *Ohio*, 367 U.S. 643, 655 (1961), we held that "*all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (Italics supplied.) Fingerprint evidence is no exception to this comprehensive rule.

394 U.S. at 724.

Despite the Court of Appeals' statement that *Davis* was applicable to appellant's case, the Rockland County Court ruled, in appellant's later *coram nobis* action, that *Davis* had "prospective effect only." *People* v. *Gates*, 61 Misc. 2d 250, ——, 305 N.Y.S.2d 583, 588 (1969), *aff'd on other grounds*, 36 App. Div. 761, 319 N.Y.S.2d 569 (1971). This ruling is inconsistent not only with the implication of the *Davis* opinion and the holding of New York's highest court, but also with *Mills* v. *Wainwright*, 415 F.2d 787, 790 (5th Cir. 1969), applying *Davis* to fingerprinting following an illegal arrest occurring prior to the date *Davis* was decided, as well as other cases assuming *Davis* to be applicable retroactively, *see, e.g.*, *Hamrick* v. *Wainwright*, 465 F.2d 940, 942-43 (5th Cir. 1972); *United States ex rel. Dessus* v. *Pennsylvania*, 452 F.2d 557, 561 (3d Cir. 1971), *cert. denied*, 409 U.S. 853 (1972); *United States* v. *Aloisio*, 440 F.2d 705, 710-11 (7th Cir.), *cert. denied*,

to the print evidence on this ground. 24 N.Y.2d at 670, 249 N.E.2d at 432, 301 N.Y.S.2d at 601. The court's opinion does not in any way allude to the objection quoted above; instead, it states that appellant failed "even to intimate

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404 U.S. 824 (1971); *United States* v. *Seay*, 432 F.2d 395, 400 (5th Cir. 1970), *cert. denied*, 401 U.S. 942 (1971). Judge Carter below concluded:

> *Davis* did not enunciate a new doctrine, but merely extended the exclusionary rule of *Mapp* v. *Ohio*. . . . The *Davis* decision . . . described an existing rule of law. Thus, there is no issue here of applying a new rule retroactively.

United States ex rel. Gates v. *Henderson*, No. 73 Civ. 3865 (S.D.N.Y. May 27, 1976), slip op. at 2 n.2. On this appeal, the State has agreed with—and indeed emphasizes the correctness of—the district court's conclusion. Brief for Respondent-Appellee at 20.

Some question might possibly be raised about this conclusion in view of *United States* v. *Peltier*, 422 U.S. 531 (1974), holding *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973) (border patrol searches), inapplicable retroactively. The *Peltier* Court emphasized, however, that an exclusionary rule holding will be given solely prospective effect only "if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law. . . ." 422 U.S. at 538 (emphasis in original); *see id.* at 541 (conduct of officers in *Peltier* had received "continuous judicial approval"). *Peltier* thus evidently does not affect the retroactivity of decisions that clarify or extend, rather than overrule or sharply change, existing law. *United States* v. *Martinez*, 526 F.2d 954, 955, 956 (5th Cir. 1976) (opinion on rehearing) (petition for rehearing en banc denied, 9-5); *People* v. *Morales*, —— App. Div. 2d ——, ——, 383 N.Y.S.2d 608, 615 n.* (1976) (Murphy, J., dissenting) (issue not reached by majority). *But see United States* v. *Peltier*, *supra*, 422 U.S. at 544-49 & n.3 (Brennan, J., dissenting).

The *Davis* decision, by its own terms, was merely a clarifying decision. Moreover, the conduct in which the police engaged in *Davis* (and allegedly here), arrest without probable cause, had received repeated judicial condemnation, contrary to the situation in *Peltier*, since 1806, *Ex parte Burford*, 7 U.S. (3 Cranch) 447, 452 (1806) (Marshall, *C.J.*), and federal standards had been unquestionably applicable to arrests by state officers since 1963, *Ker* v. *California*, 374 U.S. 23, 34-35 (1963), over three years before appellant's arrest. *See also Beck* v. *Ohio*, 379 U.S. 89 (1964) (evidence taken from defendant at police station following arrest without probable cause should have been excluded at state trial). In view of these clear judicial statements, no New York police officer in 1966 could have "reasonably believed in good faith" that the arrest of appellant, if without probable cause, "was in accordance with the law." *United States* v. *Peltier*, *supra*, 422 U.S. at 538.

that such an issue was in the case." *Id.* Appellant then applied for a writ of error *coram nobis*, which was denied. 61 Misc. 2d 230, 305 N.Y.S.2d 583 (Rockland County Ct. 1969). The Appellate Division affirmed, 36 App. Div. 2d 761, 319 N.Y.S.2d 569 (1971), and the Court of Appeals denied further leave to appeal. Neither of the opinions on *coram nobis* mentioned the objection quoted above; both assumed, without discussion, that no objection on the relevant ground had been made at trial.[3]

Appellant next petitioned the United States District Court for the Southern District of New York for a writ of habeas corpus. The court was perplexed about the lack of reference to the above-quoted objection in the three state court opinions dealing with Gates' conviction and confinement, and by letter asked counsel for clarification. Following receipt of counsel's responses, the court denied the petition, ruling that the state court opinions are "to be understood as holding that counsel's objection . . . was not sufficiently specific to raise the fruit of an unlawful arrest argument." No. 73 Civ. 3865 (S.D.N.Y. May 27, 1976), slip op. at 7.

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3 The Rockland County Court said:

> It is undisputed that the objections now sought to be raised by the defendant were not asserted by him at the time of trial. . . . It was not until argument before the Court of Appeals on February 27, 1969, two years after defendant's conviction, that he, for the first time, raised the issue of alleged violation of his Federal constitutional rights and which he now claims requires that his judgment of conviction be vacated.

61 Misc. 2d at ——, 305 N.Y.S.2d at 585-86. However, the court went on to consider *Davis* v. *Mississippi*, *supra*, but concluded that *Davis* was not to be applied retroactively. *See* note 1 *supra*. The Appellate Division stated: "Appellant never raised his Fourth Amendment claim in the trial court. . . ." 36 App. Div. 2d at 761, 319 N.Y.S.2d at 570. It went on to hold that he had "forfeited [the] right [to raise the issue] by failing to raise the constitutional question in the trial court and then to test any adverse ruling on appeal from the judgment. . . ." *Id.*, 319 N.Y.S.2d at 571.

The Applicability of Stone v. Powell

After the district court's ruling below, the Supreme Court decided a case that bears directly on the cognizability of appellant's petition. In *Stone* v. *Powell*, 44 U.S.L.W. 5313 (U.S. July 6, 1976), the Court held "that where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 5321 (footnotes omitted). Appellant here seeks relief on precisely this ground; his claim of an absence of probable cause for his arrest is in essence a claim of unconstitutional seizure in violation of the Fourth and Fourteenth Amendments. *See Gerstein* v. *Pugh*, 420 U.S. 103, 111-16 (1975); *Cupp* v. *Murphy*, 412 U.S. 291, 294 (1973). There is little doubt, moreover that the *Stone* case was intended by the Supreme Court to apply retroactively to habeas petitions then pending in the federal courts. *See* 44 U.S.L.W. at 5322 n.38; *id.* at 5333 (Brennan, *J.*, dissenting); *LaVallee* v. *Mungo*, 44 U.S.L.W. 3761 (U.S. July 6, 1976) (per curiam) (vacation of judgment and remand to court of appeals for further consideration in light of *Stone*); *Bracco* v. *Reed*, 540 F.2d 1019, 1020-21 (9th Cir. 1976); *Chavez* v. *Rodriguez*, 540 F.2d 500, 502 (10th Cir. 1976) (per curiam); *Poindexter* v. *Wolff*, 540 F.2d 390, 391 (8th Cir. 1976) (per curiam).

Stone v. *Powell* forecloses habeas review, however, only when the petitioner had "an opportunity for full and fair litigation of [his] Fourth Amendment claim," and appellant argues that he received no such opportunity here. The Court in *Stone* did not elaborate on the substance of

the "opportunity" required,[4] and its various formulations of the rule provide limited assistance, *see* 44 U.S.L.W. at 5317, *quoting Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973) (Powell. *J.*, concurring) ("'a fair opportunity to raise and have adjudicated the question'"); 44 U.S.L.W. at 5319 ("the opportunity for full and fair consideration of [the] claim"); *id.* at 5320 (rejection of claim by state courts); *id.* at 5321 n.37 ("an opportunity for a full and fair litigation of [the] claim at trial and on direct review"). In a footnote to the summary of its holding, the Court did indicate that *Townsend* v. *Sain*, 372 U.S. 293 (1963), is of some relevance to the question whether an adequate opportunity has been provided, *see* 44 U.S.L.W. at 5321 n.36, although the *"cf."* signal preceding the citation makes its exact meaning uncertain, *see A Uniform System of Citation* 7 (12th ed. 1976) ("Cf. [means] [c]ited authority supports a proposition different from that in text but sufficiently analogous to lend support. . . . *'Cf.'* should not be used without any explanatory parenthetical.").

Townsend v. *Sain, supra,* which held that an evidentiary hearing was required to determine whether a confession underlying a state court conviction was obtained involuntarily through use of "truth serum," spelled out six situations in which a state habeas petitioner is entitled to an evidentiary hearing in federal court because of the inade-

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4 In one of the two cases consolidated in *Stone*, the petitioner had received a suppression hearing in the state trial court on his claim of an unlawful search. *See* 44 U.S.L.W. at 5315 & n.3. In the other case, the petitioner's Fourth Amendment claim hinged on whether a vagrancy ordinance was unconstitutional. *See id.* at 5314. Since this contention was legal, not factual, in nature, a formal suppression hearing was apparently not held.

quacy of state fact-finding proceedings.[5] Its citation by the *Stone* Court may thus have been a suggestion that these situations are ones in which "an opportunity for full and fair litigation of a Fourth Amendment claim" is absent. Two of the Townsend categories seem relevant here. The first involves the state court's not making findings of fact and leaving the legal grounds for its conclusion uncertain. *See* 372 U.S. at 314. The state trial court here simply "overruled" appellant's objection, with no statement of either factual or legal grounds, and none of the reviewing courts even mentioned the objection. While appellant may not have "tendered" the constitutional issues with precision, *see id.*, we understand *Townsend* to place some obligation on state courts to articulate reasons for their decisions on federal constitutional questions.[6] In the absence

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5 The six situations are:

1. Where the state court has not made adequate factual or legal findings to support its conclusion, 372 U.S. at 313-16;

2. Where the state factual determinations are "not fairly supported by the record," *id.* at 316;

3. Where "serious procedural errors" have been employed in the factfinding process, *id.*;

4. Where newly discovered evidence bearing upon the constitutionality of the detention is alleged in a habeas application, *id.* at 317;

5. Where "evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing," unless there was "inexcusable" default under *Fay* v. *Noia*, 372 U.S. 391, 438 (1963), 372 U.S. at 317; and

6. Where—open-endedly—"the state court has not after a full hearing reliably found the relevant facts," *id.* at 318.

6 It could be argued that, among the functions served by a statement of reasons at a state court hearing, the statement may help litigants to clarify the grounds for their constitutional objections. For example, the trial judge here might have told appellant's counsel, "I overrule your objection on the basis that the Fifth Amendment's protection against testimonial compulsion does not extend to fingerprints." Counsel might then have clarified his objection by indicating that his concern was a Fourth, not a Fifth, Amendment one, relating to the fruits of an un-

of such reasons, a habeas petitioner cannot be said to have received "even . . . the semblance of a full and fair hearing." *Id.* at 313.

A second *Townsend* category, perhaps more significant here, is one in which, "for any reason not attributable to the inexcusable neglect of petitioner, see *Fay* v. *Noia* [372 U.S. 391, 438 (1963)], evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing . . . ." 372 U.S. at 317. The evidence crucial to appellant's claim was that relating to the circumstances surrounding his arrest, and it is clear that this evidence was not developed at all, *see People* v. *Gates*, *supra*, 24 N.Y.2d at 668 n.2, 670, 249 N.E.2d at 451 n.2, 452, 301 N.Y.S.2d at 599 n.2, 601. A question of considerable importance, however, is whether appellant's failure to specify the precise ground for his constitutional objection constitutes "inexcusable neglect" as the term was used in *Townsend*, *supra*. *Fay* v. *Noia*, it will be recalled, granted the federal district court a "[n]arrowly circumscribed" power to "deny relief to an applicant who has deliberately by-passed the orderly procedure of the state courts," 372 U.S. at 438; the term "inexcusable neglect" is not to be found in that case.

State Procedural Default

The district court concluded that appellant's objection was not "sufficiently specific" for state law purposes and ruled that this state procedural ground precluded the granting of federal habeas relief. Slip op. at 7-9. This conclusion, that the state courts held the objection insufficiently specific, however, is doubtful. None of the three state opinions even mentioned the objection cited by appel-

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lawful arrest. *Cf. Henry* v. *Mississippi*, 379 U.S. 443, 448 (1965) (trial judge can seek elaboration of objections to introduction of evidence).

lant here; it was only from this silence that the district court drew the inference that the objection was insufficiently specific. But it is at least equally plausible that the state courts were not aware of, or for some reason chose to ignore, appellant's objection. Whatever the adequacy of the objection, it certainly "intimated" that the Fourth Amendment might be an issue, especially since the Fifth Amendment claim had already been foreclosed by *Schmerber, supra,* yet the New York Court of Appeals stated that appellant "fail[ed] . . . even to intimate that such an issue was in the case . . . ." 24 N.Y.2d at 670, 249 N.E.2d at 452, 301 N.Y.S. 2d at 601. *See also* note 3 *supra.*

The Court of Appeals' statement in the opinion on appellant's direct appeal is especially difficult to fathom in view of its own earlier statement (in a case cited in that opinion) that merely "some effort in th[e] direction" of a Fourth Amendment objection is sufficient to preserve the question for appellate review. *People* v. *Friola,* 11 N.Y.2d 157, 159, 182 N.E.2d 100, 101, 227 N.Y.S.2d 423, 424 (1962). *See also United States ex rel. Vanderhorst* v. *LaVallee,* 417 F.2d 411, 412 (2d Cir. 1969) (en banc) (citing New York authority for propositions that "'no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right'" and that "a constitutional issue may be raised for the first time on appeal in New York"), *cert. denied,* 397 U.S. 925 (1970). *See also People* v. *Patterson,* 39 N.Y.2d 288, 347 N.E.2d 898, 383 N.Y.S.2d 573 (1976) (no objection necessary to preserve constitutional claim). Moreover, if the state courts were holding, as the court below believed, that the objection appellant did make was inadequate for state law purposes, the normal and proper course would have been for them to state that holding and supporting reasons. *Cf. Arlinghaus* v. *Ritenour,* No. 75-7616 (2d Cir. Oct. 26, 1976) (per curiam), slip op. 239, 244 ("A decisionmaker obliged to

give reasons to support his decision may find they do not; 'the opinion will not write.'"). Since they made no such statement, it remains inappropriate for a federal court to dismiss a habeas petition on the basis of pure speculation as to what the state courts might implicitly have been holding. *See Townsend* v. *Sain, supra,* 372 U.S. at 314-16. Nothing in *Stone* v. *Powell* affects this aspect of the federal courts' obligations.

Even if the holding as to state law were explicit, moreover, it does not follow that this state procedural ground would give the district court power to deny federal habeas relief. Under *Fay* v. *Noia, supra,* such power exists only if the procedural default in the state courts amounted to a "deliberate bypass" of state procedures. 372 U.S. at 438. *See also Lefkowitz* v. *Newsome,* 420 U.S. 283, 290 n.6 (1975). Under that test, the federal habeas court must make an "independent determination" that the habeas petitioner—assisted by counsel but making the final decision himself—"understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts . . . ." 372 U.S. at 439. *See also id.* at 433-37.[7] No such determination was made by the district court here, nor is there any indication in the record that appellant knowingly waived his federal claims. On the contrary, his counsel was at least asserting *some* constitutional claim in respect to the evidence by his objection; doubtless appellant would have thought such an assertion procedurally sufficient. Given the vital importance of the fingerprint

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7 While the "deliberate bypass" language of *Fay* was reaffirmed as late as 1975 in *Lefkowitz* v. *Newsome,* 420 U.S. 283, 290 n.6 (1975), that language could conceivably be under reexamination by the Court. *See Estelle* v. *Williams,* 44 U.S.L.W. 4609, 4613-14 (U.S. May 3, 1976) (Powell, *J.*, concurring) ("'inexcusable procedural default'" in connection with a "trial-type right"); *id.* at 4616 n.5 (Brennan, *J.*, dissenting); *Francis* v. *Henderson,* 44 U.S.L.W. 4620, 4622-27 (U.S. May 3, 1976) (Brennan, *J.*, dissenting). *But see* text at notes 8-9 *infra.*

evidence to the State's case, it would have been senseless for appellant to have waived any available objection to the admission of the evidence. No trial tactic by anyone could conceivably involve omission to make such an objection. This court has recently held that failure to object at all to a charge to the jury did not constitute deliberate bypass, when the petitioner's trial strategy indicated that the lack of objection was inadvertent. *Kibbe* v. *Henderson*, 534 F.2d 493, 496-97 (2d Cir. 1976), *petition for cert. filed*, 45 U.S.L.W. 3905 (U.S. July 1, 1976) (No. 75-1906). It follows a fortiori that, when a lack of objection would have been virtually fatal to the petitioner's case, and when an objection was in fact made on constitutional grounds, the petitioner cannot be said, in the absence of clear evidence of a knowing waiver, to have deliberately bypassed the state courts.[8]

The State argues, however, that the *Fay* deliberate bypass rule has been modified by two recent Supreme Court decisions. *Estelle* v. *Williams*, 44 U.S.L.W. 4609 (U.S. May 3, 1976), and *Francis* v. *Henderson*, 44 U.S.L.W. 4620 (U.S. May 3, 1976). But nothing in either decision purports to affect *Fay* in any way, although the dissenting opinions suggest a sub silentio modification of *Fay*, *see* 44 U.S.L.W. at 4616-18 (Brennan, J., dissenting); 44 U.S.L.W. at 4622-27 (Brennan, J., dissenting). *See also Stone* v. *Powell*, *supra*, 44 U.S.L.W. at 5328 n.12 (Brennan, J., dissenting); note 7 *supra*.

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8 The State asserts in its brief that *United States ex rel. Tarallo* v. *LaVallee*, 433 F.2d 4 (2d Cir. 1970), *cert. denied*, 403 U.S. 919 (1971), is controlling here. We believe that case is distinguishable, however, because the petitioner there made no objection at all on constitutional grounds when the evidence allegedly seized illegally was originally introduced at trial, *id.* at 7, so that his later objection was untimely. Here there is no question that appellant seasonably objected "on constitutional grounds." It is specificity, not timeliness, that is at issue here.

In *Estelle* the habeas petitioner did not object at trial to being tried in prison garb, and the Court ruled that, because he had not been *compelled* to stand trial so attired, his petition should not have been granted. While the exact ground of the Court's decision is somewhat obscure, *see* 44 U.S.L.W. at 4616 (Brennan, J., dissenting), the thrust of the majority opinion goes to "compulsion," rather than to waiver. *See id.* at 4610-11, 4613. Mr. Justice Powell, in a concurring opinion joined by Mr. Justice Stewart, did argue that a failure to object "at a time when a substantive right could have been protected" should be treated the same as a knowing waiver, *id.* at 4613, but his opinion makes apparent that he is referring to a situation in which counsel failed entirely to object, *id.*, when fully aware of clear constitutional grounds on which he could have objected, *id.* & n.1. By contrast, appellant's counsel here did raise an objection, was probably not fully aware of the constitutional grounds available to him (because *Davis* v. *Mississippi*, *supra*, had not yet been decided), and, as discussed above, could not conceivably have made a "tactical choice" to decline to object on any ground remotely likely to succeed.

Francis v. *Henderson*, *supra*, rests upon a concern with placing habeas petitioners from state judgments on an equal footing with those from federal judgments with regard to challenges to the composition of grand juries. Following *Davis* v. *United States*, 411 U.S. 233 (1973), the Court ruled that a state petitioner who failed to make a "timely challenge" to the grand jury's composition could not challenge the composition in a federal habeas proceeding. 44 U.S.L.W. at 4620-22. The opinion states:

> If, as *Davis* held, the federal courts must give effect to [specified grand jury-related] concerns in [28 U.S.C.] § 2255 proceedings, then surely considerations of comity and federalism require that they give no less

effect to the same clear interests when asked to overturn state criminal convictions.

Id. at 4622. The Court did not go beyond this narrow rationale to the broader *Fay* v. *Noia* waiver question, despite the majority's clear awareness, from the dissenting opinion, of the broader ground available. It would be inappropriate for us, as a lower court, to speculate about what *Francis* v. *Henderson* "really means" or about what the Supreme Court may do in the next case. Except as modified narrowly by *Francis* as to grand jury challenges, *Fay* v. *Noia* remains good law, and, as the Supreme Court has recently reminded us, "[o]ur institutional duty is to follow until changed the law as it now is . . .," *Hudgens* v. *NLRB*, 424 U.S. 507, 518 (1976).

We therefore conclude that appellant did not commit the sort of procedural default that would bar him from asserting a federal claim in this collateral proceeding. It follows under *Townsend* v. *Sain*, *supra*, that the state courts' failure to develop evidence crucial to appellant's claim deprived him of a state opportunity fully and fairly to litigate it. Because such an opportunity is a critical precondition to the application of *Stone* v. *Powell*, *supra*, that case does not operate here to prevent the district court from reaching the merits of appellant's Fourth Amendment claim. Our analysis above also indicates that the district court erred in holding that New York procedural requirements barred federal consideration of appellant's claim on a petition for habeas corpus.[9]

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9 The State argues that appellant failed to exhaust his state remedies, as he is required to do by 28 U.S.C. § 2254(b). A state prisoner must present to the state courts "the substance" of his federal claim, although he need not "cit[e] 'book and verse on the federal constitution.'" *Picard* v. *Connor*, 404 U.S. 270, 278 (1971), *quoting Daugharty* v. *Gladden*, 257 F.2d 750, 758 (9th Cir. 1958); *see, e.g., United States ex rel. Gibbs* v. *Zelker*, 496 F.2d 991, 993-94 (2d Cir. 1974); *Mayer*

Accordingly, the judgment of the district court is reversed and the cause remanded for a hearing on the merits of appellants claim.[10]

TIMBERS, *Circuit Judge*, dissenting:

Judge Carter's eminently correct decision below denying this state prisoner's petition for a writ of habeas corpus should have been affirmed in a one sentence order reading, "Affirmed on the authority of *Stone* v. *Powell*, —— U.S. —— (1976), 44 U.S.L.W. 5313 (U.S. July 6, 1976)." From the majority's refusal to do so, I respectfully but emphatically dissent.

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v. *Moeykens*, 424 F.2d 855, 858-59 (2d Cir.), *cert. denied*, 417 U.S. 926 (1974). Presentation to the state courts, however, has not been construed to mean presentation at every level of the state court system; it is sufficient for exhaustion purposes if a federal issue is first raised on a state appeal. *See Picard* v. *Connor*, *supra*, 404 U.S. at 273-74, 276 (by implication); *United States ex rel. Nelson* v. *Zelker*, 465 F.2d 1121, 1124 (2d Cir.), *cert. denied*, 409 U.S. 1045 (1972). In the instant case, regardless of the adequacy under *Picard* v. *Connor*, *supra*, of appellant's trial-level constitutional objection, *cf. United States ex rel. Gibbs* v. *Zelker*, *supra*, 496 F.2d at 904 (we would hardly insist that the [objection] . . . be raised in the state court in the specific garb of a federal constitutional question . . ."), there is no question that the precise Fourth Amendment issue was presented to the New York Court of Appeals on direct review and to three levels of the state court system in connection with appellant's *coram nobis* petition. It is clear that "the state courts [had] a fair chance [to] resolv[e] the constitutional problems of petitioner's case." *Id.*

10 It is unfortunate that in the rhetoric of the dissenting opinion our dissenting brother did not see fit to discuss, let alone analyze, how the State here "provided an opportunity for full and fair litigation of a Fourth Amendment claim" within the express language of *Stone* v. *Powell*, *see* Point I *supra*. Perhaps the dissent's fire is misdirected and it is the exclusionary rule and *Davis* v. *Mississippi*, *supra*, with which it is so upset, since they operate to exclude illegally obtained fingerprint evidence. As for setting free a "convicted first degree murderer" after ten years, we were unaware that there was a statute of limitations on the exercise of constitutional rights.

Granted that the majority opinion is an artful effort to circumvent *Stone*, significantly it fails to accord any deference to the strong view expressed in *Stone*, based on deeply rooted public policy, that the exclusionary rule is unique and should not be invoked on habeas petitions under the circumstances described by Mr. Justice Powell in *Stone* and more fully in his concurring opinion in *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973). That view, in my opinion, applies with particular force to the circumstances of the instant case.

The majority opinion is a striking illustration of the mischief that results when one of the "inferior courts"[1] takes it upon itself to vent its displeasure with recent decisions of the United States Supreme Court. And the mischief is not mitigated by the assertion that recent Supreme Court decisions have "complicated analysis in the instant case" and forced the majority to "struggle to understand the implications of the recent High Court cases". —— F.2d at ——.

With deference, the only complication and confusion is that spawned by today's struggling majority opinion, the practical result of which will be to turn loose upon society a convicted first degree murderer now serving a prison term of 20 years to life. To suggest any other result would be utterly naive, in view of the virtual impossibility of determining probable cause *ten years* after the fact.

The radiations from today's majority opinion will have an impact far beyond the confines of this case and this Circuit. I wish I could believe they would be for the good of the Republic.

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1 U.S. Const. art. III, §1.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Ralph McMurry, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for respondent-appellee herein. On the 25th day of January, 1977, he served the annexed upon the following named person :

Jesse Berman, Esq
351 Broadway
NY NY
10013

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by for that purpose.

Ralph McMurry

Sworn to before me this
25th day of January, 1977

Joan P. Scannell
Assistant Attorney General
of the State of New York